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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Southwest Fair Housing Council,

10 Plaintiff,

11 v.

12 WG Chandler Villas SH LLC,

13 Defendant.  
14

No. CV-19-00178-TUC-RM

**ORDER**

15 Pending before the Court is Plaintiff's Motion in Limine to Preclude Testimony of  
16 Defense Rebuttal Expert Robert Q. Pollard. (Doc. 66.) Defendant responded in  
17 opposition. (Doc. 67.) The Court held an evidentiary hearing pursuant to *Daubert v.*  
18 *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), on September 29, 2021. Upon  
19 considering the written briefing by the parties and the testimony and argument presented  
20 at the evidentiary hearing, the Court will grant in part and deny in part the Motion in  
21 Limine.

22 Plaintiff's Motion in Limine moves to preclude the testimony of Defendant's  
23 rebuttal expert witness Robert Q. Pollard, Ph.D. pursuant to Federal Rule of Evidence  
24 702 and *Daubert*, 509 U.S. 579. (Doc. 66.) Plaintiff argues that the testimony should be  
25 precluded because (1) Dr. Pollard is not a qualified expert, (2) the testimony is unreliable  
26 because Dr. Pollard does not explain how his experience leads to his conclusions nor  
27 does he explain his methodology; (3) Dr. Pollard intends to testify as to pure  
28 unsubstantiated speculations or beliefs and/or legal conclusions; and (4) Dr. Pollard

1 intends to testify to Defendant's employee's state of mind. (*Id.* at 2.) Plaintiff further  
2 argues that Dr. Pollard's testimony would violate Fed. R. Evid. 403 by confusing and  
3 misleading the jury and unduly prejudicing Plaintiff while providing little probative  
4 value. (*Id.*) Thus, Plaintiff seeks preclusion of the testimony or, in the alternative, an  
5 Order limiting Dr. Pollard's testimony to the narrow issue of rebutting Plaintiff's expert's  
6 testimony regarding communications with deaf persons in a nursing home setting. (*Id.*)

7 In response, Defendant argues that Dr. Pollard's testimony should be admitted  
8 because (1) Dr. Pollard is a qualified expert; (2) the testimony is reliably based on his  
9 extensive experience in discrimination cases involving deaf individuals; (3) he will not  
10 offer legal conclusions or testimony concerning Defendant's employee's state of mind;  
11 (4) the testimony will help the jury because it is relevant to the factual issues the jury will  
12 be deciding; and (5) Dr. Pollard was disclosed as an initial expert and is not limited to the  
13 role of a "rebuttal expert." (Doc. 67.)

#### 14 **I. Legal Standard**

15 "Evidence is relevant if (a) it has any tendency to make a fact more or less  
16 probable than it would be without the evidence; and (b) the fact is of consequence in  
17 determining the action." Fed. R. Evid. 401. "The court may exclude relevant evidence if  
18 its probative value is substantially outweighed by a danger of one or more of the  
19 following: unfair prejudice, confusing the issues, misleading the jury, undue delay,  
20 wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

21 Admissibility of expert testimony is governed by Rule 702 of the Federal Rules of  
22 Evidence, which provides:

23 A witness who is qualified as an expert by knowledge, skill,  
24 experience, training, or education may testify in the form of  
25 an opinion or otherwise if: (a) the expert's scientific,  
26 technical, or other specialized knowledge will help the trier of  
27 fact to understand the evidence or to determine a fact in issue;  
28 (b) the testimony is based on sufficient facts or data; (c) the  
testimony is the product of reliable principles and methods;  
and (d) the expert has reliably applied the principles and  
methods to the facts of the case.

1 Fed. R. Evid. 702. This rule requires the trial court to “ensure that any and all scientific  
2 testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at  
3 589. To do so, the court must assess “whether the reasoning or methodology underlying  
4 the testimony” is valid and “whether that reasoning or methodology properly can be  
5 applied to the facts in issue.” *Id.* at 592-93. This gatekeeping function applies not only to  
6 expert testimony based on “scientific” knowledge but also expert testimony based on  
7 “technical” and “other specialized” knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S.  
8 137, 141, 147-49 (1999). Its purpose is to ensure “that an expert, whether basing  
9 testimony upon professional studies or personal experience, employs in the courtroom the  
10 same level of intellectual rigor that characterizes the practice of an expert in the relevant  
11 field.” *Id.* at 152.

12 Factors relevant to the reliability of expert testimony include, but are not limited  
13 to, whether the theory or technique used by the expert “can be (and has been) tested,”  
14 whether it “has been subjected to peer review and publication,” “the known or potential  
15 rate of error,” “the existence and maintenance of standards controlling the technique’s  
16 operation,” and the degree of acceptance in the relevant community of expertise.  
17 *Daubert*, 509 U.S. at 593-94; *Kumho Tire*, 526 U.S. at 149-50. In assessing the reliability  
18 and helpfulness of proffered expert testimony, “no single factor is necessarily dispositive  
19 of the reliability of a particular expert’s testimony.” Fed. R. Evid. 702, Advisory  
20 Committee Notes (2000) (internal citations omitted).

21 Rule 702’s “helpfulness” standard requires that expert testimony be relevant to  
22 issues in the case and that there be “a valid scientific connection to the pertinent inquiry  
23 as a precondition to admissibility.” *Daubert*, 509 U.S. at 591. An expert’s opinions may  
24 not be premised on “subjective belief or unsupported speculation.” *Id.* at 590 (internal  
25 quotation marks omitted). Relevancy requires that “[t]he evidence ... logically advance a  
26 material aspect of the party’s case.” *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

27 The Court’s gatekeeping obligation under Rule 702 is “a flexible one” that “must  
28 be tied to the facts of a particular case.” *Kumho Tire* at 150. Thus, “the trial judge must

1 have considerable leeway in deciding in a particular case how to go about determining  
 2 whether particular expert testimony is reliable.” *Id.* at 152. Whether to admit expert  
 3 testimony is subject to the discretion of the Court. *See General Elec. Co. v. Joiner*, 522  
 4 U.S. 136, 143 (1997).

## 5 **II. Background**

6 Dr. Pollard is a Clinical Professor of Psychiatry at the University of Rochester  
 7 School of Medicine in Rochester, New York. (*See* Doc. 66-1.) He is also a Professor and  
 8 Associate Dean of Research at the Rochester Institute of Technology’s National  
 9 Technical Institute for the Deaf (“NTID”). (*Id.*) His career has been dedicated to “the  
 10 subject of psychology and deaf individuals and related topics such as sign language  
 11 interpreting, and public health and the deaf population.” (*Id.* at 12.) He has been a faculty  
 12 member in the Department of Psychiatry at the University of Rochester School of  
 13 Medicine for 29 years. (*Id.*) He founded the University’s Deaf Wellness Center, which  
 14 conducts a variety of clinical service, training, research, and scholarship activities. (*Id.*)  
 15 In August 2016, he became the first permanent Associate Dean of Research at the NTID.  
 16 (*Id.*) There, he is responsible for the NTID’s research activities and oversees training  
 17 grants and contract activities. (*Id.*) He engages in clinical service and research and has  
 18 published over 100 articles, books, and book chapters, served as principal investigator on  
 19 55 grants totaling over \$6M, delivered over 250 invited addresses throughout the U.S.  
 20 and abroad, and made over 100 conference presentations. (*Id.*) He has also served as an  
 21 expert witness in over 30 cases alleging discrimination against a deaf individual. (*Id.* at  
 22 10.)

23 The opinions expressed in Dr. Pollard’s report are based upon his review of  
 24 Plaintiff’s expert Dr. Shepard-Kegl’s report, along with his experience and knowledge in  
 25 the fields of psychology and deafness and related topics. (*See id.* at 5.) Dr. Pollard’s  
 26 expert report first reviews the conclusions of Dr. Shepard-Kegl’s report and responds to  
 27 specific statements contained therein. (Doc. 66-1 at 4-6.) Specifically, Dr. Pollard  
 28 describes Dr. Shepard-Kegl’s report as “incongruous” because of the distinction between

1 the “heterogeneity” and variability of deaf individuals—i.e. their unique abilities, needs,  
2 and preferences—and Dr. Shepard-Kegl’s application of “general” information regarding  
3 deaf individuals to the fictional deaf grandmother present in this case. (*Id.* at 5-6; *see also*  
4 Doc. 62.)

5 Dr. Pollard’s expert report then reviews the transcripts of testers’ communications  
6 with Defendant’s staff and analyzes the extent to which those interactions and/or  
7 communications are consistent with his knowledge and experience regarding deaf  
8 individuals. (*Id.* at 7-10.) Dr. Pollard points out purported inconsistencies between the  
9 substance of the transcripts and Plaintiff’s arguments regarding the denial of a reasonable  
10 accommodation to a deaf individual; for example, that Plaintiff’s tester does not disclose  
11 until well into her conversation with Defendant’s employee that the fictional grandmother  
12 is deaf or that the grandmother has the ability to read and write, as well as the tester’s  
13 failure to raise the issue of reasonable accommodations when discussing her  
14 grandmother’s activities such as going to the movies or restaurants. (*Id.*)

15 Dr. Pollard concludes that the “general” nature of Dr. Shepard-Kegl’s expert  
16 report renders it not relevant to this litigation because it addresses neither a specific deaf  
17 individual nor anything specific regarding Defendant’s assisted living facility. (*Id.* at 10.)  
18 He further concludes that the report fails to thoroughly address the tester’s data that might  
19 suggest a different outcome than that argued by Plaintiff. (*Id.*) Lastly, he concludes that  
20 the Defendant in this case did not fail to do what was needed to meet the fictional deaf  
21 individual’s reasonable accommodation needs. (*Id.*)

### 22 **III. *Daubert* Hearing**

23 The Court held a *Daubert* hearing on September 29, 2021, at which Dr. Pollard  
24 testified as to his qualifications, methodology, experience, and conclusions, and each  
25 party presented its arguments as to why Dr. Pollard’s expert testimony should be either  
26 excluded or admitted. Dr. Pollard testified that his knowledge of reasonable  
27 accommodations for deaf individuals stems from his professional experience, his  
28 published research, his previous testimony in approximately fifty civil cases involving an

1 American Sign Language (“ASL”) interpreter as a reasonable accommodation, and his  
2 personal lived experience. Dr. Pollard then testified as to the methodology that he would  
3 use to determine whether an ASL interpreter was a reasonable accommodation for a deaf  
4 individual. He testified that he would consider two categories of information: information  
5 about the deaf individual and information about the situation or circumstance in which  
6 the interpreter was purportedly necessary. As to a deaf individual, Dr. Pollard testified  
7 that he would consider (1) the individual’s preferred communication modality; (2) the  
8 individual’s proficiency in that modality; (3) whether the individual uses hearing aids or  
9 other assistive technologies; (4) the individual’s “fund of information,” that is, the  
10 quantity and quality of the information or knowledge they possess; and (5) whether the  
11 individual has other developmental issues. As to a situation or circumstance, Dr. Pollard  
12 testified that he would consider (1) the stakes of the situation—for example, a medical  
13 procedure (high stakes) vs. a sales transaction (low stakes); (2) the communication  
14 methods used in the situation; and (3) the extent of hearing individuals’ knowledge about  
15 deaf individuals and deafness.

#### 16 **IV. Discussion**

##### 17 **A. Dr. Pollard is a qualified expert.**

18 Plaintiff argues first that Dr. Pollard is not a qualified expert because (1) he has no  
19 experience working in assisted living facilities that serve deaf individuals; (2) he has not  
20 testified as an expert witness at a civil trial in the past four years; and (3) he has no  
21 experience evaluating testers in fair housing cases. (Doc. 66 at 3.) In response, Defendant  
22 contends that the fact that Dr. Pollard has no experience working in an assisted living  
23 facility and has not testified at a civil trial in the last four years does not undermine his  
24 extensive experience with the issues involving reasonable accommodations for deaf  
25 individuals that the jury will decide and thus he is a qualified expert. (Doc. 67 at 4-5.)

26 The Court finds that Dr. Pollard is a qualified expert. His extensive experience  
27 working with deaf individuals in professional, clinical, research, and personal settings  
28 qualify him as an expert on the matters to which his testimony pertains. Furthermore, Dr.

1 Pollard has testified as an expert in at least thirty civil legal cases. The Court finds no  
2 basis upon which to question his qualifications as an expert witness.

3 **B. Dr. Pollard's testimony will be helpful to the jury.**

4 Plaintiff also argues that Dr. Pollard's testimony would not be helpful to the jury  
5 because it merely recounts the Complaint and summarizes documents, both of which the  
6 jury will be able to view and evaluate for itself. (Doc. 66 at 6.) Plaintiff argues that Dr.  
7 Pollard's testimony does not provide information beyond that of a typical lay person and  
8 that the jury can accomplish its own analysis of the evidence without Dr. Pollard's  
9 opinions. (*Id.*) In response, Defendant contends that Dr. Pollard has specialized  
10 knowledge and experience that will assist the jury in determining whether an ASL  
11 interpreter was necessary to ensure effective communication under the circumstances  
12 present in this case, and that this issue is beyond the scope of a typical juror's knowledge.  
13 (Doc. 67 at 6-7.)

14 The Court finds that Dr. Pollard's testimony will assist the jury in its fact-finding  
15 duties to the extent it is admissible as set forth in this Order, except for his testimony that  
16 Defendant did not fail or refuse to provide an ASL interpreter, discussed *infra* at Section  
17 IV(E).

18 **C. Dr. Pollard's rebuttal testimony regarding Dr. Shepard-Kegl's expert**  
19 **report is admissible.**

20 Plaintiff argues that if Dr. Pollard is permitted to testify, he should be limited to  
21 rebuttal testimony only. (Doc. 66 at 8.) Plaintiff contends that Dr. Pollard was only  
22 engaged in this case to rebut the opinions of its expert witness, Dr. Shepard-Kegl, and  
23 thus to whatever extent his report exceeds the bounds of Dr. Shepard-Kegl's report it  
24 should be excluded. (*Id.* at 8-9.) In response, Defendant contends that it disclosed Dr.  
25 Pollard as its initial expert and did not identify him solely as a rebuttal expert, and thus he  
26 is not limited to acting in that capacity. (Doc. 67 at 7-8.)

27 Plaintiff does not dispute Dr. Pollard's rebuttal testimony. As the Court has found  
28 Dr. Pollard to be a qualified expert and has also found that his testimony will be helpful



1 to the jury, his testimony rebutting Dr. Shepard-Kegl's report is admissible. The Court  
2 further finds that Defendant disclosed Dr. Pollard as an initial expert and therefore his  
3 testimony is not limited to rebuttal testimony on that basis. (*See* Doc. 67 at 8.)

4 **D. Dr. Pollard's testimony is not reliable regarding whether an ASL**  
5 **interpreter was a reasonable accommodation for the fictional deaf grandmother.**

6 Plaintiff argues that Dr. Pollard's testimony is unreliable because he has not  
7 explained how his experiences in clinical psychology led to the conclusions he reached,  
8 why his experience is sufficient, or how he applied his experience to the facts. (Doc. 66 at  
9 4.) Thus, Plaintiff argues, because Dr. Pollard has not demonstrated a reliable  
10 methodology for forming his opinions, they must be excluded. (*Id.*) In response,  
11 Defendant contends that Dr. Pollard's professional and expert witness experiences are  
12 directly relevant to the issues that the jury will decide and that throughout his report, Dr.  
13 Pollard explains why he reached the conclusions he did. (Doc. 67 at 5-6.)

14 The Court agrees with Plaintiff that Dr. Pollard has failed to adequately explain  
15 how his experience and knowledge apply to the issue of whether an ASL interpreter was  
16 necessary as a reasonable accommodation in this case. Specifically, Dr. Pollard testified  
17 at the *Daubert* hearing that his methodology in determining whether an ASL interpreter  
18 would be a reasonable accommodation for a deaf individual includes an evaluation of (1)  
19 the individual's preferred communication modality; (2) the individual's proficiency in  
20 that modality; (3) whether the individual uses hearing aids or other assistive technologies;  
21 (4) the individual's "fund of information," that is, the quantity and quality of the  
22 information or knowledge the individual possesses; and (5) whether the individual has  
23 other developmental issues. There is no evidence in Dr. Pollard's report or his hearing  
24 testimony that he applied these factors to the fictional deaf grandmother who was the  
25 prospective tenant of Defendant's facility. Indeed, Dr. Pollard testified that he did not  
26 have enough information about the fictional deaf grandmother to evaluate her need for an  
27 interpreter based on those factors. Thus, there is no way that Dr. Pollard could have  
28 properly applied his methodology to the facts at issue. *See Daubert*, 509 U.S. at 592-93.



1 Accordingly, Dr. Pollard's testimony regarding the fictional deaf grandmother's need or  
2 lack thereof for an ASL interpreter will be excluded.

3 However, Dr. Pollard's testimony is admissible to the extent that it sets forth his  
4 opinions about how the relative of a deaf individual—in this case, Plaintiff's tester—  
5 would behave or communicate in the situation present in this case. Dr. Pollard also may  
6 testify to his opinion that the tester did not provide Defendant's employee Mr. Ommegard  
7 with sufficient information for Defendant to be able to determine whether an ASL  
8 interpreter was necessary as a reasonable accommodation. Dr. Pollard adequately  
9 explained how he applied his methodology in evaluating the actions and communications  
10 of Plaintiff's tester, and his expert opinions on this matter will assist the jury in its fact-  
11 finding.

12 **E. Dr. Pollard's conclusions regarding whether Defendant failed to provide a**  
13 **reasonable accommodation are inadmissible.**

14 Plaintiff argues that Dr. Pollard's opinions offer pure conclusions of law and thus  
15 are not admissible under Federal Rule of Evidence 702. (Doc. 66 at 6.) Specifically,  
16 Plaintiff takes issue with Dr. Pollard's statements that (1) Defendant did not "flat-out"  
17 deny interpreter services and (2) Defendant did not fail to do what was necessary to meet  
18 the fictional deaf grandmother's needs for reasonable accommodations. (*Id.* at 6-7.)  
19 Plaintiff contends that these statements are conclusions of law and thus should be  
20 excluded. (*Id.*) In response, Defendant contends that these statements are not legal  
21 opinions or conclusions but rather are opinions on an "ultimate issue" in the case and  
22 thus, pursuant to Federal Rule of Evidence 704, are not automatically objectionable on  
23 that basis. (Doc. 67 at 7.)

24 "[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an  
25 opinion on an ultimate issue of law." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523  
26 F.3d 1051, 1058 (9th Cir. 2008); *see also United States v. Boulware*, 558 F.3d 971, 975  
27 (9th Cir. 2009) (trial court did not abuse its discretion in excluding expert testimony in  
28 the form of a legal opinion).

As discussed above in Section IV(D), Dr. Pollard's application of his methodology to the issue of whether the fictional deaf grandmother required an ASL interpreter as a reasonable accommodation for her deafness is inadmissible.<sup>1</sup> Because Dr. Pollard may not testify to his opinion that an ASL interpreter was not a reasonable accommodation under these circumstances, he likewise may not testify to his conclusion, which follows from that opinion, that Defendant did not fail to provide that reasonable accommodation. In other words, because Dr. Pollard may not opine on the issue of whether the grandmother needed the requested reasonable accommodation, he may not opine on whether that request was properly denied because that conclusion rests entirely on the inadmissible portions of his opinion.

Furthermore, the Court finds that Dr. Pollard's conclusion that Defendant did not fail to meet the fictional deaf grandmother's reasonable accommodation needs is a legal conclusion and is also inadmissible on that basis. *See Nationwide Transp. Fin.*, 523 F.3d at 1058; *see also* Doc. 62 at 19-20 (denying summary judgment on the issue of whether Defendant violated the Americans with Disabilities Act by failing to provide a reasonable accommodation in the form of an ASL interpreter).

**F. Dr. Pollard's statements regarding Defendant's employee Mr. Ommegard are inadmissible.**

Plaintiff argues that Dr. Pollard's report improperly offers opinions as to Defendant's employee's state of mind. (Doc. 66 at 7-8.) Plaintiff argues that Dr. Pollard's statements as to the state of mind of Defendant's employee Mr. Ommegard,<sup>2</sup> are improper because they are subjective and rest on assumptions not based on Dr. Pollard's knowledge or experience. (*Id.*) In response, Defendant contends that Dr. Pollard's statements regarding Mr. Ommegard's intentions during his conversation with Plaintiff's

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<sup>1</sup> Also inadmissible is Dr. Pollard's testimony that Defendant did not fail or refuse to provide an ASL interpreter. The Court finds that such testimony would not be helpful to the jury because the jury can evaluate for itself, based on the recorded conversations between Plaintiff's tester and Defendant's employee, whether Defendant failed or refused to provide an ASL interpreter.

<sup>2</sup> Mr. Ommegard is Defendant's Community Sales Director, with whom Plaintiff's tester toured the assisted living facility in June 2016. (*See* Doc. 62 at 4.)

1 tester are “interpretations” that point out information Plaintiff’s tester failed to provide.  
 2 (Doc. 67 at 7.) Defendant argues that the point of Dr. Pollard’s opinions regarding Mr.  
 3 Ommegard’s statements is to show Plaintiff’s tester’s failure to clearly express her  
 4 fictional deaf grandmother’s need for an interpreter. (*Id.*)

5 The Court agrees with Plaintiff that Dr. Pollard’s testimony regarding Mr.  
 6 Ommegard’s intentions, state of mind, and scope of authority is not admissible. Dr.  
 7 Pollard did not explain how he applied his methodology to Mr. Ommegard’s  
 8 communications with Plaintiff’s tester. Furthermore, Dr. Pollard’s opinions regarding Mr.  
 9 Ommegard’s statements appear to be subjective and not based on his knowledge or  
 10 experience. Dr. Pollard testified during the *Daubert* hearing that he did not review Mr.  
 11 Ommegard’s job description or qualifications and knew nothing about him. Thus, his  
 12 expert testimony on this matter is not reliable and will be excluded.<sup>3</sup>

13 Accordingly,

14 **IT IS ORDERED** that Plaintiff’s Motion in Limine to Preclude Testimony of  
 15 Defense Rebuttal Expert Robert Q. Pollard. (Doc. 66) is **granted in part and denied in**  
 16 **part** as follows:

17 (1) Dr. Pollard’s testimony regarding whether an ASL interpreter was a reasonable  
 18 accommodation for the fictional deaf grandmother is **inadmissible**.

19 (2) Dr. Pollard’s testimony regarding whether Defendant failed to provide a  
 20 reasonable accommodation is **inadmissible**.

21 (3) Dr. Pollard’s testimony regarding the intentions, state of mind, and scope of  
 22 authority of Defendant’s employee Mr. Ommegard is **inadmissible**.

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27 <sup>3</sup> Dr. Pollard may testify generally to the interactions and communications between Mr.  
 28 Ommegard and Plaintiff’s testers in order to explain his opinions. His testimony  
 regarding Mr. Ommegard is inadmissible only to the extent that he reaches conclusions  
 about Mr. Ommegard’s state of mind and/or scope of authority.

1 (4) Dr. Pollard's testimony is otherwise **admissible**.

2 Dated this 13th day of October, 2021.

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Honorable Rosemary Márquez  
United States District Judge